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FILED
CHARLOTTE, NC

NOV 01 2011

U.S. DISTRICT COURT
WESTERN DISTRICT OF NC

5 United States District Court
6 for the
7 Western District of North Carolina

8 ROBYN ADOLPHE

9 Plaintiff,

10 Vs.

11 Option One Mortgage Corporation/ Jeffrey A.
12 Bunda;
13 David Applegate President (AHMSI)
14 American Home Mortgage Servicing, Inc.;
15 Merrill Lynch Mortgage, Investors Inc.,
16 Mortgage Loan Asset Backed Certificates
17 Series 2003-OPT1 Wells Fargo; John Stumpf,
18 President; FIRST AMERICAN TITLE
19 INSURANCE COMPANY; Dennis Gilmore,
20 CEO; Joesph C. Patterson, Agent from
21 Carolina Realty; Moss Codilis, LLP; (LPS)
22 Lender Processing Solutions, Inc.; Elizabeth B.
23 Ells;
24 Grady I. Ingle; Jeffery A. Bunda, Substitute
25 Trustee;

26 Defendants,

) Case No: 3.11cv418

) (Assigned to the Honorable Judge)

) PLAINTIFF'S OPPOSITION
) TO OPTION ONE MORTGAGE
) CORP., et al MOTION TO DISMISS

27 NOW COMES Plaintiff, Robyn Adolphe, *pro per*, pursuant to, *inter alia*, Rule 1 of the
28 F.R.Civ.P., hereby enters her objection to the Defendants' motion to dismiss Plaintiff's claim,
and asks that this Court DENY the motion, on the grounds that the Plaintiff has stated a claim,
and provided sufficient facts upon which relief can be granted, that the Defendants acts were
not harmless and/or unknowing error committed accidentally and/or without the knowledge of
Defendants.

ARGUMENT AND MEMORANDUM OF POINTS AND AUTHORITIES

I. Plaintiff is Not Required to Tender as Claimed in the Motion to Dismiss

1. For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*

1 Plaintiff's claim, and asks that this Court DENY the motion, on the grounds that the
2 Plaintiff has stated a claim, and provided sufficient facts upon which relief can be
3 granted, that the Defendants acts were not harmless and/or unknowing error
4 committed accidentally and/or without the knowledge of Defendants.

5 ARGUMENT AND MEMORANDUM OF POINTS AND AUTHORITIES

6 I. Plaintiff is Not Required to Tender as Claimed in the Motion to Dismiss

7 1. For purposes of a motion to dismiss, the plaintiff's allegations are taken
8 as true, and the Court must construe the complaint in the light most favorable to the
9 plaintiff. *Jenkins v. McKeithen*, 395 U.S.411, 421 (1969). To defeat such a motion, the
10 factual allegations must simply be "enough" to raise a right to relief above the
11 speculative level...on the assumption that all the allegations in the complaint are true
12 (even if doubtful in fact). "*Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007), (quoting 5
13 *Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedures* §1216 (3d ed.
14 2004). Further, the court must draw all reasonable inferences in the plaintiff's favor,
15 *Doe v United States*, 419 F.3d 1058, 1062 (9th Cir. 2005), and presume that allegations
16 embrace those specific facts that are necessary to support the claim, "*Luguan v. Nat'l*
17 *Wildlife Fed*, 497 U.S. 871, 889 (1990). Thus factual disputes are properly resolved only
18 on summary judgment or at trial, not on a motion to dismiss. *Celotex Corp v Catrett*,
19 477 U.S. 317, 327 (1986).

20 2. Herein, based on the publicly recorded documents and documents
21 supplied by Plaintiff it appears that the chain of title was broken and the parties
22 before the court cannot possibly have any right, title or interest in Plaintiff's property
23 and that they are not the correct foreclosing entities. Plaintiff has ownership interest
24 rights and possession of the subject property and has never given up those rights
25 either expressed or implied. Plaintiff would be irreparably harmed through the loss of
26 her unique and valuable property and has the only verifiable equitable interest in the
27 property between the parties to this action. Defendants are nothing more than a
28 "Fictitious Payee". For this reason the motion to dismiss should be denied.

3. Plaintiff has never been under any obligation to tender, i.e. during the

1 pendency of the dispute of debt, which has never been resolved, and there is no duty
2 to tender. Though Plaintiff contacted the originator servicer and trustee, no response
3 to her dispute was ever made.

4 4. When Plaintiff learned of the fraudulent nature of the loan and the
5 transaction undertaken by defendants without her knowledge, she offered to rescind
6 the loan/transaction. This rescission was never accepted nor responded to.

7 **II. All Defendants are Responsible for the Acts of the Other Defendants**

8 Plaintiff alleges that the Defendants individually and in concert acted to wrongfully
9 deprive her of her property. Where a crime (fraud) is requested at the request of
10 another, all are responsible.

11 **III. Fraud is Specifically Pled**

12 5. Plaintiff has pled fraud in the purported assignment of the deed of Trust
13 and fraud and concealment in the predatory loan given to Plaintiff. Plaintiff further
14 pleads fraud in the conveyance of her note and deed of trust to a Real Estate Mortgage
15 Backed Security Investment Trust. Plaintiff alleges fraud in knowing intent to
16 wrongfully "convey" title to her property in contradiction of this Trust and the
17 governing pooling and servicing agreement.

18 6 All defendants are accused of fraud by plaintiff as every false purported
19 conveyance of the trustee, the beneficial or the beneficial interest in Plaintiff's note and
20 Deed of Trust was known by Defendants as it was being done.

21 7. Plaintiff further alleges that Defendants knew they had no right to
22 "convey" any right title or interest in Plaintiff's note and/or Deed of Trust. (See,
23 attached affidavit the Plaintiff filed in Support of this Opposition to Motion to
24 Dismiss).

25 **IV. Statute of Limitations Should be Tolle**

26 8. An action based upon the rescission of a contract in writing. The time
27 begins to run from the date upon which the facts that entitle the aggrieved party to
28 rescind occurred.

9. Where the ground for rescission is fraud or mistake, the time does not

1 begin to run until the discovery by the aggrieved party of the facts constituting the
2 fraud or mistake. The time does not begin to run until the representation becomes
3 false. The federal doctrine of fraudulent concealment operates to toll the statute of
4 limitations" where a plaintiff has been injured by fraud and 'remains in ignorance of it
5 without any fault or want of diligence or care on his part.'"See, Holmberg v.
6 Armbrecht, 327 U.S. 392, 397; Maggio v. Gerard Freezer & Ice Co., 824 F.2d 123, 127
7 (1st Cir. 1987).

8 10. Defendants' motion to dismiss completely misstates Plaintiff's causes of
9 action. This was done intentionally to divert the Court's attention from the true facts.
10 As alleged in Plaintiff's Complaint, the Defendants in this case acted together and in
11 concert to wrongfully and fraudulently foreclose and evict Plaintiff from her home
12 based on a predatory loan and investment scheme that was intentionally not disclosed
13 to Plaintiff and done with the intent to defraud the Plaintiff in violation of federal and
14 state laws regulating credit, banking and foreclosure.

15 11. Further, due to the nature of the investment scheme and the fees
16 charged to Plaintiff, all payments under the obligation have been paid on the
17 mortgage obligation and it is not actually in "default". Further, American Home
18 Mortgage Servicing Inc. (AMHSI) has submitted false documents to the court,
19 specifically the Trust Deed, for the litigation to evict the Plaintiff.

20 **II. All Defendants are Responsible for the Acts of the Other Defendants.**

21 12. Plaintiff alleges that the Defendants individually and in concert acted to
22 wrongfully deprive him of his property. Where a crime (fraud) is requested at the
23 request of another, all are responsible. "Persons jointly participating in the crime as
24 where the act is committed by one person at the request of another, are each
25 responsible as principals .

26 13. Defendants have knowingly recorded spurious documents, which have
27 been offered for record with intent to defraud. Carolina law prohibits this very
28 action.

SECTION 16-13-10. Forgery.

1 (A) It is unlawful for a person to:

2 (1) falsely make, forge, or counterfeit; cause or procure to be falsely made,
3 forged, or counterfeited; or wilfully act or assist in the false making, forging, or
4 counterfeiting of any writing or instrument of writing;

5 (2) utter or publish as true any false, forged, or counterfeited writing or
6 instrument of writing;

7 (3) falsely make, forge, counterfeit, alter, change, deface, or erase; or cause or
8 procure to be falsely made, forged, counterfeited, altered, changed, defaced, or erased
9 any record or plat of land; or

10 (4) willingly act or assist in any of the premises, with an intention to defraud
11 any person.

12 (B) A person who violates the provisions of this section is guilty of a:

13 (1) felony and, upon conviction, must be fined in the discretion of the court or
14 imprisoned not more than ten years, or both, if the amount of the forgery is ten
15 thousand dollars or more;

16 (2) felony and, upon conviction, must be fined in the discretion of the court or
17 imprisoned not more than five years, or both, if the amount of the forgery is less than
18 ten thousand dollars.

19 (C) If the forgery does not involve a dollar amount, the person is guilty of a
20 misdemeanor under the jurisdiction of the magistrates or municipal court,
21 notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, and 14-25-65,
22 and, upon conviction, must be fined in the discretion of the court or imprisoned not
23 more than three years, or both.

24 14. Defendant has produced no enforceable original note with any
25 assignment or allonge proving up the chain of title.

26 15. Defendant has failed to prove that it is the holder of rights under the
27 alleged note, which would permit the legal holder thereof to declare a default which
28 would trigger a foreclosure.

Standing Cannot Be Waived and Defendant Lacks Standing.

16. Plaintiffs obligation, as it is written, is current and Plaintiff never defaulted. (See, Exhibits 3 and 4, Loan# 0603307230) attached to the Declaration of Robyn Adolphe filed in Support of this Opposition to Motion to Dismiss Defendant failed to resolve dispute of debt back in 2009 and has never produced the necessary documents to resolve. Further, the obligors under the note have been dutifully paying the Creditors (Investors).

17. Because the obligation is not in default the foreclosure was fraudulent and should be overturned and Defendants Motion to Dismiss should be denied.

18. Defendant SHAPIRO & INGLE, LLP as "trustee" for unnamed "Certificateholders" of a "trust" has failed to demonstrate that it and not the Certificateholders is the party with the true ownership interest in the "loan"

19. Defendant SHAPIRO & INGLE, LLP as "trustee" for unnamed "Certificateholders" has failed to demonstrate that it has any authority from the Certificateholders.

20. Defendant refuses to explain the business relationships among the securitization parties, remaining silent on the subject, thereby denying and concealing the very existence of the parties, the agreements among them, and the substantial money that changed hands.

21. Plaintiff has received conflicting representations as to the alleged creditor's identity, and believes there exists a title defect or cloud on his title.

CONCLUSION

22. Based on the facts stated above and supported by the publicly filed documents, it is clear that these Defendants do not hold a beneficial interest in Plaintiffs note and mortgage, let alone a secured interest in Plaintiffs property. Plaintiff moves the court to deny Defendants' motion to dismiss and to allow this case to proceed on the merits. In the alternative, Plaintiff requests the Court grant her leave to amend the Complaint.

1 AMERICAN HOME MORTGAGE SERVICE INC.
2 MOSS CODILIS

3 Frank A. Hirsch Jr. (N.C. Bar No. 130904)
4 Heather Bell (N.C. Bar No. 25239)
5 Andru A. Wall (N.C. Bar No. 24593)
6 David Applegate (President)

7 ALSTON & BIRD LLP
8 4721 Emperor Blvd., Suite 400
9 Durham, NC 27703
10 ATTORNEY FOR DEFENDANTS

11 WELLS FARGO BANK, N.A., as Trustee for MERILL LYNCH MORTGAGE, INVESTORS
12 INC.

13 FIRST AMERICAN TITLE
14 MERILL LYNCH MORTGAGE, INVESTORS
15 HORACK TALLEY
16 2600 One Wells Fargo Center
17 Charlotte, NC 28202-6006
18 Phillip E. Lewis
19 Glenn Ketner
20 ATTORNEYS FOR DEFENDANTS
21 President- John Stumpf

22 OPTION ONE MORTGAGE / SAND CANYON CORP.

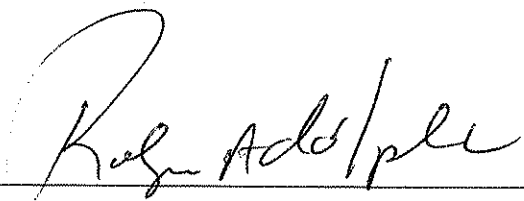
23 Brett M. Shockley North Carolina Bar No. 20572
24 William C. Mayberry North Carolina Bar No. 41587
25 McGuire Woods LLP North Carolina
26 200 N. Tryon Street, Suite 3000
27 Charlotte, NC 28202
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ATTORNEYS FOR DEFENDANTS S&I, INGLE, ELLS, BUNDA, NEILL and BEGOR

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By:


Robyn Adolphe, *pro per*

Signed reserving all my rights at UCC 1-308